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William Caton  
Federal Communications Commission  
1919 M St. NW, Rm. 222  
Washington, D.C. 20554


Re: Docket Nos. MM 92-266 and CS 96-60

Dear Mr. Caton:

Enclosed per Commission Rules please find the Original plus 4 copies of the Comments of Leased Access Producer Mark Kliem in the above entitled matter. Also enclosed please find one copy for each of the Commissioners (5 copies total), and one copy to be conformed and returned to our office in the enclosed self addressed stamped envelope.

Please call our office if you have any questions.

Very truly yours,

  
Bob Weidman  
Legal Assistant

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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In the Matter of Implementation of Sections of the Cable  
Television Consumer Protection and Competition  
Act of 1992: Rate Regulation, Leased Commercial  
Access

Docket Nos. MM 92-266 and CS 96-60

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COMMENTS OF LEASED ACCESS PRODUCER MARK KLIEM

Leased access producer Mark Kliem hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking Re Leased Access Rates.

### FACTUAL BACKGROUND

Attached as Exhibit A is Mr. Kliem's narrative of his attempts first to use the public access channel, and then the leased access channel, on Viacom's San Francisco cable television system. A short summary of that narrative follows.

In March 1991, Mr. Kliem created a community-based show for the local gay and lesbian community in San Francisco. Mr. Kliem's show, entitled "Lavender Lounge", was originally designed to be aired on public access television. Mr. Kliem waited eight months for a time slot on the public access channel, and then was given one at an inappropriately early time of day. (The frank content of Mr. Kliem's show, while eschewing nudity and obscenity, drew complaints both from families watching at the earlier time slot and from the show's natural audience which desired to see the show at a later hour.) Finally, Viacom suggested that he move to the leased access channel.

Although Viacom was totally unresponsive to Mr. Kliem, his show prospered on leased access from 1993 through early 1995. In May, 1995, however, Viacom announced a 450% increase in leased access fees, and imposed other onerous conditions on the leased access producers. As a result, Mr. Kliem was forced to abandon the production of Lavender Lounge.

### LEGAL DISCUSSION

We begin by noting that Congress in the 1984 Cable Act opted for an operational model for cable television whereby the owner of the cable infrastructure would

also control content on most of the channels on the operator's system, rather than a common carrier model which would have separated infrastructure ownership from system content. The only federally mandated attempts to diversify control and content within a given system were the leased access rules<sup>1</sup>.

As an experiment in diversity, the leased access rules have been a dismal failure. Cable operators have made the use of the leased access channels as onerous as possible, by quadrupling leased access rates as soon as they received the Commission's "green light" to do so in 1993, by requiring leased access producers to provide expensive insurance coverage and answer intrusive and unnecessary questions about themselves, and by not making leased access rates and conditions immediately and easily available. Aside from Mr. Kleim, specific examples of this phenomenon are found in the Comments of Thomas Schaefer/StrategicVideo filed in this proceeding, and in the well known case of TCI's effective removal of Free Speech TV/The 90s Channel ("FSTV") from its leased access channels by quadrupling the rates FSTV was paying for leased access.

Nor will competition "save" leased access. Despite optimistic forecasts to the contrary, the provision of cable and phone services are natural monopolies, and there will be no effective competition in the cable television field for some while, if ever. At most, there will be two wires into the house (one from the telephone company, one from

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<sup>1</sup>One might argue that the must-carry rules were another attempt to diversify content within the cable system. The primary purpose of the must-carry rules, however, was to protect existing broadcast stations in the cable operator's area. In the view of this commentator, they have not measurably advanced the cause of diversity because both the broadcasting stations and the cable operator have the same demographic and market constraints, share the same market culture, and because there is often cross-ownership between the cable operator and the local broadcast outlets.

the cable company), and this oligopoly will not provide sufficient competition to protect the consumer. No amount of competition will protect the leased access producer, because his interests naturally and historically have run counter to those of the system operator.

In view of the above, we find the Commission's proposals for calculating a "reasonable" leased access charge<sup>2</sup> based on an operator's "costs" completely unmanageable and susceptible to every manipulation of the accounting wizards in the entertainment industry.

We view ourselves as something akin to the little boy who points out that the Emperor has no clothes. We feel compelled to note that the language quoted in footnote 2 below -- some of the less dense language in the Notice of Proposed Rulemaking -- will be unintelligible to the prospective leased access producer, the person who will have to understand these rules in order to keep the cable operators honest. More importantly, the prospective leased access producer will surely be unable to fathom the legerdemain of the cable operator's accountants. Without understanding the

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<sup>2</sup>Quoting from paragraph 9 of the Commission's Notice of Proposed Rulemaking:

Given these limitations of the highest implicit fee, the Commission is proposing an alternative that we believe may better promote the goals of leased access. Under our proposed approach, the maximum rate for leased access would depend on whether or not the cable operator is leasing its full statutory set-aside requirement. When the full set-aside capacity is not leased to unaffiliated programmers, the maximum rate would be based on the operator's reasonable and quantifiable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit. The operator would be allowed to continue to use subscriber revenues (including the subscriber revenues associated with leased access channels) to offset the costs of the cable system. In addition, the operator would be allowed to charge the leased access programmer to cover the reasonable costs of bumping channels to accommodate leased access programmers. The operator would also be permitted to charge part-time leased access programmers any additional costs associated with negotiating and administering part-time leased access programming contracts. In our view, this approach would result in a rate that would better promote the statutory objective of diversity by encouraging unaffiliated programmers to lease the channel capacity. The purpose of the cost formula is not, however, to lower leased access rates.

calculation of the operator's costs, the leased access producer will have no way of ascertaining the validity of the operator's proposed leased access rates.

To achieve the First Amendment goals which originally animated leased access, we believe the Commission must do the following:

(1) Create a **very simple formula** for the calculation of leased access rates, one which is not dependent on information not readily available. We suggest that the Commission create a rebuttable presumption that a reasonable leased access rate is \$50-75/hour (which has been the standard in many communities for much of the pre-1993 period), which would be applicable until rebutted in a formal Commission proceeding or District Court action. In any event, the formula must be simple and the rate affordable if people like Mr. Kliem are going to be able to use leased access;

(2) require the cable operator to make its rates and conditions for leased access immediately and readily available to anyone for the asking;

(3) prohibit cable operators from enforcing onerous conditions for the use of leased access, including a prohibition on any requirement that the leased access producer furnish the operator with insurance;

(4) provide that any leased access producer denied access by the cable operator may recover attorneys' fees upon prevailing at the Commission or before a District Court. Without a provision for attorneys' fees, a leased access regime is meaningless. Most leased access producers cannot afford counsel sufficiently competent to do battle with the industry's well-versed and well-heeled attorneys in this very specialized area; and

(5) provide that in cases of egregious or repeatedly unjustified denials of access, a cable operator's license may be forfeited.

Respectfully submitted

LAW OFFICES OF CHRISTOPHER WITTEMAN

DATED: 5-7-96

By: Christopher P. Witteman  
Christopher P. Witteman  
Attorneys for Leased Access Producer Mark Kliem

NARRATIVE OF MARK KLIEM,  
EXECUTIVE PRODUCER OF LAVENDER LOUNGE

In March 1991 I created a gay/lesbian television show called "Lavender Lounge" for Public Access in San Francisco. The Viacom Corporation is the monopoly cable television provider in San Francisco, California and has managed the Public Access facility since its inception.

At that point in time, our Public Access channel was over-crowded (because Viacom refused to transmit more than 8 hours a day of Public Access programming) and air time was very competitive. I waited eight months to get a time slot. It turned out to be Tuesday afternoons at 1:30 PM. By being forced to accept an afternoon time slot, I was subjected to numerous complaints from "concerned parents" simply because it contained gay/lesbian content during hours that children may be watching.

Please note that Lavender Lounge was light entertainment with no nudity or obscene language. Other than being a gay/lesbian program, it fit the standards for decency seen on any national cable network. Viacom was unwilling to either satisfy consumer complaints nor satisfy my potential viewing audience by scheduling my show at a more appropriate hour.

Frustrated that the waiting list for an evening time slot could take up to two years, I was forced to find other alternatives. Despite being a very active user of Public Access and a long time cable subscriber, I was not aware that a separate Leased Access channel was even available. After numerous inquiries about time slot options, the Viacom management finally suggested that if I was willing to pay for air time, I could move my show to Leased Access.

Channel 53 (at that time the Leased Access Channel) was the last channel on the cable system with a very poor signal that ran nothing but a network feed from a home-shopping network. The price was \$50 per half hour, with virtually no other programs on the schedule. The signal quality of that channel was so poor, we just assumed it was "different" for some reason, and would remain that way. After a few months of programming, we mounted a promotional blitz to publicize an upcoming special show. One of my more bold partners pressed the management to improve the signal. They reluctantly complied on the very day of our special, but only because of our cajoling.

Our show became quite popular. Because Public Access was no longer a viable option, I concentrated my efforts on making Leased Access viable, and I attempted to make money selling advertising.

In my transition from "free" user of Public Access to "paying"

EXHIBIT A



customer of Leased Access, I attempted to exert some consumer advocacy with Programming Director Barrett Giorgis, asking him for further improvements with signal quality, help with publicizing the show, and a more affordable rate structure. The conversation ended with a vehement Mr. Giorgis literally screaming into the phone, "...I'd rather run SNOW!" Having been forewarned that Mr. Giorgis is consistently hot tempered, unyielding and sanctimonious, I gave up hope for cooperation from the Viacom corporation.

In 1993, Viacom found it necessary to juggle all their channels around just to comply with FCC "must-carry" rules. Over a period of just a few months, Public Access moved from channel 25 to 51 to 53, and Leased Access moved from channel 53 to 51 to 47. With shows on channels that kept changing, it became a promotional nightmare. Each change was supposed to warrant 30 days notice, but in my case, it was always much less because they could never find my correct mailing address.

The show progressed steadily in 1994 and the beginning of 1995 as I concentrated on improving the show and selling advertising. However, in May 1995, Viacom without warning more than quadrupled their rates for Leased Access. Viacom announced new rates for Leased Access, with their usual delay due to misplacing my current address.

According to the enclosed Rate Sheet, the weekly cost to air my show in the time slot I held for 2 1/2 years would go from \$50 per week to \$230.36 per week. My lease would be canceled after one year, and they demanded some vague insurance requirement that even Viacom's own Leased Access Programming Coordinator could not explain. With only a few weeks notice, it was impossible for me to start paying the increased fees, so I was forced to pull the show.

Selling advertising on a gay/lesbian television show is unprecedented and therefore challenging and difficult in any event. Coupled with the fact that canceling the show on such short notice caused me to re-negotiate commitments with already tenuous advertising clients, Viacom caused me undue embarrassment, loss of income, and loss of confidence in dealing with my clients.

Viacom's unwritten policy seems is apparently to keep Leased Access air time secretive and difficult to obtain. My show was often the only actual programming on the Leased Access channel for that entire day. They made no effort to promote any local programming on any of their other channels or in any other medium. I met with Viacom's Public Relations Director, Sue Levitan, in an attempt to set up a cooperative effort to improve Viacom's image by spotlighting a few of the unique, innovative local programs available. I found her to be defensive, guarded, stalwart and clueless.

Despite efforts to revamp the show we have found it economically unfeasible to continue to produce local Leased Access programming.

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